well.[16] Rather than requesting the abolishment of the negotiation process, we request by our comments limited intervention by the Commission to set the rate for interconnection compensation.[17]

As noted in the Economic Issues paper, there exists asymmetry in market power between LECs and CMRS providers which can negatively affect the price term negotiated:

> [b]ecause of the unequal bargaining positions of CMRS providers and LECs, and because of the incentive of the LECs to use the pricing of interconnection service to extend or protect their market position, negotiations between LECs and CMRS providers that are unconstrained by regulatory rules or controls are unlikely to yield efficient interconnection compensation arrangements that are in consumers' interests.[18]

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[16] It is also important to note that these earlier statements favoring negotiations were made in the context of choosing between negotiations versus tariff filing requirements. Obviously reciprocal termination was favored over tariffing then, and still is now, as CTIA explained in its initial Comments in this docket.

[17] Commenters recognize that the price term for interconnection is just one aspect of an interconnection agreement, and that it can be a contentious issue. See, e.g., SBC Communications, Inc. Comments at 22 ("Although terminating rates are just one aspect of any interconnection agreement, that issue has the greatest possibility of being contentious.")

[18] Economic Issues at 2. For CMRS carriers, a high proportion of calling relies upon interconnection with the LEC network. For this reason, CMRS subscribers highly value interconnected service. For LEC subscribers, though, interconnection with a CMRS carrier is not as highly-valued. "As a result of this asymmetry, the LEC can expect to be in a far stronger bargaining position. The LEC 'needs' interconnection less than the CMRS provider, and can far more credibly threaten to 'walk away' from the bargaining table if it doesn't get what it wants." Id. at 6-7.

As CMRS carriers transition from providing primarily complementary services to providing wireless local exchange service in competition with the LECs, this inequality in bargaining power becomes more problematic; therefore, limited regulatory intervention is warranted.

## II. THE COMMISSION SHOULD EXERCISE ITS AUTHORITY TO PREEMPT STATE REGULATION OF LEC-CMRS INTERCONNECTION RATES.

### A. The Commission's Decision to Preempt State Regulation of Reciprocal Termination Would Be Entitled to Chevron Deference Upon Judicial Review.

The focus of the debate over reciprocal termination has shifted dramatically from assessing the substantive merits and drawbacks of reciprocal termination into a series of highly technical, sometimes divergent, and almost invariably detailed appraisals of the Commission's underlying jurisdiction and corresponding preemptive authority.[19] While this effort to shift

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[19] See Bell Atlantic Corporation and Pacific Telesis Group written ex parte presentation in CC Docket 95-185 (February 26, 1996) ("Bell Atlantic/PacTel February ex parte"); Bell Atlantic Corporation and Pacific Telesis Group written ex parte presentation in CC Docket 95-185 (March 13, 1996). (Bell Atlantic/PacTel March ex parte").

The March ex parte primarily focussed upon a jurisdictional theory that Congress' revisions to Section 332 in 1993 federalized all CMRS: because the Commission "occupies the field," state rate regulation, including regulation of interconnection rates, is prohibited. See Bell Atlantic/PacTel March ex parte at 5-6. In a recent forum sponsored by the Office of General Counsel of the Commission, an additional criticism of this theory was interposed, to wit: assuming all CMRS interconnection rates are in fact interstate, then attendant revenues must be reallocated to the federal side for separations purposes. This, it was argued, would create a shortfall to the states of approximately three billion dollars.

CTIA's theories of jurisdiction over LEC to CMRS interconnection compensation do not in fact rely upon an "occupying the field" approach. Therefore, the criticisms raised in the March ex parte are not applicable. Moreover, as a practical matter, given the adoption of price caps and incentive regulation in a majority of states as well as the dearth of recent rate of return proceedings, in all likelihood the interconnection fees in question were not factored into state assessments of LEC revenue requirements.

the Commission's focus from substance is unfortunate on several levels, it foreshadows the decisions that the Commission must make regarding the extent of its role in introducing competition and promoting regulatory reform with respect to the local exchange.

This proceeding does not exist in a vacuum. That is, commenters have not limited their discussion of jurisdictional issues solely to LEC to CMRS interconnection. Instead, what is at stake here, and what is being debated at several levels, is what role the Commission will ultimately choose as telecommunications markets become more competitive. Contrary to the assertions of some, it is the Commission's choice in both cases whether to prescribe or to merely recommend.[20]

When all is said and done, some would argue that the Commission is faced with the following decision: to preempt or not to preempt. Others would argue that the proper query is instead: to adopt reciprocal termination or not to adopt reciprocal termination. Depending on that answer, jurisdiction can be asserted or avoided.

In the coming months, as the Commission addresses this and other related interconnection issues, it should define its policy objectives first. Then it should ascertain whether a reasonable legal interpretation in support of its goals is available. To

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[20] For an in-depth analysis of the jurisdictional issues raised in this proceeding, see CTIA's initial Comments at 56-82.

the extent that a statutory provision is capable of more than one meaning, as both Section 332 and Sections 251-253 certainly are, the Commission should make use of the latitude accorded by Chevron,[21] in furtherance of its underlying policy goals:

> Chevron has particular relevance when an agency's decision is to preempt state law. The interconnection matter at issue here is an important part of the Commission's overall goal of giving life to the congressional mandate to nurture an efficient and effective nationwide communications system. Under the circumstances, the agency's decision to preempt is entitled to particular deference in the courts.[22]

Such action "is particularly appropriate" at this stage, "given the United States Supreme Court's Chevron decision and the dangers of inefficient state regulation."[23] And the danger posed by state regulation is very real:

> [t]he practical reasons for this conclusion [i.e., that the agency is a better decision-maker to implement congressional intent] become all the more clear when one considers what would happen if the Commission remained silent and the industry faced undiminished state regulation of interconnection rates. As technology develops, not only will the rates themselves hamper the growth of modern communications, but costly litigation could arise as out-of-state companies that believe they are the victim of discriminatory treatment by state regulators raise dormant commerce clause claims in federal court."[24]

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[21] Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[22] Prof. Steven Goldberg, Georgetown University Law Center, "Commission Preemption of Interconnection Rates," at 12 (March 4, 1996), attached as an exhibit to CTIA's initial Comments ("Goldberg Preemption Analysis") (citation omitted).

[23] Id. at 2.

[24] Id. at 12-13 (citation omitted).

Quick Commission intervention is thereby warranted under the circumstances.

### B. Congress Has Accorded CMRS Networks' Interconnection A Different Legal Status Than Other Networks.

The Bell Atlantic/PacTel ex parte statements are emblematic of the arguments of those who disfavor Commission jurisdiction and preemption. They argue that interconnection issues, including LEC-CMRS interconnection (but, apparently, not IXC access), must be governed by new Sections 251 and 252 as adopted in the 1996 Act.[25] These sections establish a regulatory scheme for interconnection which assigns common carriers various levels of duties and obligations with regard to interconnection, including the obligation of the incumbent LEC to negotiate interconnection agreements. They also delineate the respective federal and state roles in this process: the Commission is charged with adopting general guidelines to implement the statute and its underlying purposes, and the state, subject to the Commission guidelines, has approval authority over the interconnection agreements.

Notwithstanding the assertion that these provisions directly apply to LEC-CMRS interconnection,[26] the 1996 Act has nothing to

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[25] In an effort to bring CMRS-LEC interconnection into the Section 251-252 regime, the ex parte statements characterize the interconnection as "local." It is clear, though, that the interconnection is for interstate as well as local service.

[26] Any claim that: (1) Sections 251 and 252 govern LEC-CMRS interconnection; and (2) the 1996 Act requires positive (continued...)

do with the issue, nor should it. The Commission adopted the Notice in this proceeding prior to passage of the 1996 legislation. The Commission had then, and retains now, authority under Sections 201 and 332 and, alternatively, under Section 2(b) to preempt state regulation of LEC to CMRS reciprocal termination. The jurisdiction runs to both the physical and the economic aspects of interconnection.

Under Section 2(b), state LEC-CMRS interconnection regulations that are incompatible with reciprocal termination are subject to the traditional "inseverability" jurisprudence. The policy underlying the Commission's reciprocal termination proposal is the promotion of efficient, competitive nationwide wireless communications facilities and services.[27] The continuing development of cellular service has demonstrated that efficiency considerations -- both architectural and operational -- often requires "clustering" of wireless systems into regional areas. Indeed, recognizing the benefits of larger, interstate service areas, the Commission adopted an MTA/BTA scheme for

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[26](...continued)
price recovery, is of very limited practical importance. Under the pricing standards established under Section 252, incumbent LECs are limited to recovery of "a reasonable approximation of the additional costs of terminating such calls," and nothing more. See 47 U.S.C. § 252 (d)(2)(A)(ii).

[27] See Notice at ¶ 111 ("preemption under Louisiana PSC may well be warranted here on the basis of inseverability, particularly in light of the strong federal policy underlying Section 332 favoring a nationwide wireless network") (citation omitted).

licensing PCS, a scheme which specifically reflects commercial realities rather than political boundaries.[28] These larger CMRS service areas (reflected in PCS with interstate BTAs and MTAs and in cellular with regionally clustered systems) are, as the Commission has concluded, the best evidence of efficient system architecture, including the optimal number and location of LEC to CMRS interconnections.[29]

Indeed, in virtually every respect, wireless networks operate without reference to state borders. Congress, in preempting state rate and entry regulation of CMRS under Section 332, specifically recognized and accounted for this fact:

> to foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications

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[28] See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order in Gen. Docket 90-314, 8 FCC Rcd. 7700, at ¶ 73 (1993) ("MTAs and BTAs were designed by Rand McNally based on the natural flow of commerce.")

[29] See, CTIA written ex parte presentation in CC Docket 95-185, at 2-3 (March 1, 1996) ("State regulation of LEC-to-CMRS interconnection rates is fundamentally inconsistent with the statutory goals of a nationwide CMRS market where the rapid deployment of wireless technology is encouraged. This is especially true in the case of PCS, which will operate in geographic areas that cross numerous state boundaries. Even if it were possible to segregate interstate and intrastate traffic, requiring a PCS provider to comply with several state compensation arrangements for a single set of facilities is directly contrary to the purposes of the section 332. Cellular networks likewise have evolved to a point where 'local' systems are now served by centralized signalling hubs that support multi-state regions. With CMRS providers increasingly utilizing such regional architecture, compliance with multiple, inconsistent rate structures for interconnection would be unnecessarily complex and burdensome.") (citations omitted).

infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.[30]

The 1996 legislation does not impact the Commission's authority under Sections 201 and 332 and, alternatively, Section 2(b), for two reasons. First, Section 201 has provided ample authority for the Commission to assert plenary jurisdiction over the physical aspects of LEC to CMRS interconnection. And under this authority, the Commission has successfully delineated the obligations LECs have vis-a-vis CMRS with regard to interconnection. The Section 201 savings clause found in Section 251(i)[31], expressly reserves this authority.[32]

If the Bell Atlantic/PacTel assertion that Sections 251 and 252 control LEC-CMRS interconnection is accurate, there has been a massive repeal of Section 332 by implication.[33] The entire regulatory regime established by Section 332, which so carefully limits the states' role in the regulation of "services that, by

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[30] H.R. Rep. No. 111, 103rd Cong., 1st Sess, 260 (1993) ("House Report").

[31] Section 251(i) states that "[n]othing within [Section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. § 251(i).

[32] Section 332 builds upon this authority. See 47 U.S.C. § 332(c)(1)(B).

[33] It is axiomatic that repeal by implication is highly disfavored, and found only in cases of irreconcilable conflict between statutory provisions. Morton v. Mancari, 417 U.S. 535 (1974); Yakima v. Tribes of Yakima County, 502 U.S. 251 (1992) (citing Posadas v. National City Bank, 296 U.S. 497, 503 (1936) ("cardinal rule . . . that repeals by implication are not favored)).

their nature, operate without regard to state lines,"[34] will necessarily give way as state regulatory oversight is re-imposed. The fact that the states' role may be limited by the 1996 Act cannot remove the fact they would have a role which did not exist, and was not contemplated, under Section 332.[35]

Second, the Commission's authority to establish implementing regulations,[36] and the states' corresponding inability to adopt regulations or policies which "substantially prevent implementation of the requirements of [Section 251] and the purposes of this part"[37] would still permit the Commission to mandate reciprocal termination at the federal and state level for CMRS.

Several final points: First, objections have been raised against adoption of reciprocal termination on the basis, among other things, that "establishing preferential interconnection policies applying only to CMRS interconnection arrangements could have the undesirable effect of favoring wireless technology."[38]

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[34] House Report at 260.

[35] Such an outcome might be sensible if, in fact, mobile services competition were falling short of the expectations that formed the predicate for the 1993 amendments to Section 332. But the opposite is true. Consumers of mobile services are experiencing more choice, and the industry is achieving explosive growth and continued new entry.

[36] 47 U.S.C. § 251(d)(1).

[37] Id. at § 251(d)(3)(C).

[38] National Association of Regulatory Utility Commissioners Comments at 3-4.

In other words, Federal policy should not promote differing regulatory regimes for essentially similar services.

In fact, the concern that regulatory disparity will arise remains within the Commission's discretion to remedy, regardless of the outcome of this proceeding.

Second, others have suggested that the Commission's adoption of reciprocal termination and its corresponding preemption of state regulation would represent an unlawful departure from past Commission policies. In essence, several commenters claim that the Commission's proposed actions represent a "wholesale reversal of its established policies;" therefore, the Commission must adequately justify its decision with a "clear evidentiary record and factual findings that the support the change."[39] The argument continues that: (1) the Commission has failed to establish that there are currently barriers to CMRS entry which need removing; nor (2) has it documented that state regulatory measures are at odds with Commission policy; therefore, adoption of reciprocal termination would be arbitrary and capricious.[40]

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[39] See, e.g., NYNEX Comments at 15.

[40] Id. at 16. These issues were addressed supra in Section I.B. In fact, the record establishes that, under the status quo, CMRS carriers are not being compensated for the costs they incur to terminate LEC traffic. Moreover, reciprocal termination will promote dynamic efficiency in furtherance of policy goals, while existing pricing arrangements will inhibit competition. Finally, the record does support that there is currently a disparity in bargaining power between LECs vis-a-vis CMRS carriers such that limited regulatory intervention to set the price term for interconnection compensation is warranted.

It is well-established that, "if the agency has offered a reasoned explanation for its choice between competing approaches supported by the record, the court is not free to substitute its judgment for that of the agency."[41] Moreover, by this action, the Commission simply acknowledges that the federal-state balance has undergone wholesale change as a result of Section 332, and that states have been ousted from traditional jurisdiction.[42]

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[41] See APCO v. FCC, supra, (citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 853 (D.C. Cir. 1970).

[42] See Connecticut Dep't. of Public Utility Control v. FCC, No. 95-4108 (2d Cir. March 22, 1996) (Second Circuit upheld FCC's preemption of Connecticut DUP regulation of cellular services wholesale rates). Cf. California v. FCC, supra (courts also recognize that "the FCC does not relinquish its preemption power simply because it has decided to exercise it narrowly, and to defer to the states in some area of common interest") (citations omitted).

**CONCLUSION**

CTIA respectfully requests that the Commission expeditiously adopt a comprehensive reciprocal termination plan to govern interconnection compensation between LECs and all CMRS providers as proposed herein and in its initial Comments.

Respectfully submitted,

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